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The Commonwealth of Massachusetts

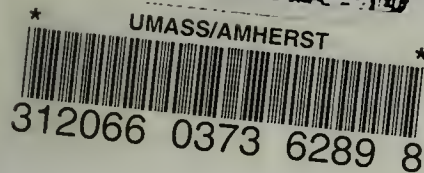
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Designer Selection Board

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TO: Cities and Towns

FROM:  George R. Beaton, P.E., Executive Director
Designer Selection Board

SUBJECT: Designer Selection Procedures for a City or Town Building Project

DATE: February 24, 1992

It is the intention of this memorandum to briefly explain the relationship between local authorities and the State Designer Selection Board and to provide local authorities with answers to a number of common and recurring questions regarding the proper application of designer selection statutes and procedures to the planning and design of local building projects.

Local authorities should be thoroughly familiar with the following provisions of Chapter 7, Section 38K (a) of the General Laws:

"Every contract for design services for any building construction, reconstruction, alteration, remodeling, or repair estimated to exceed one hundred thousand dollars (\$100,000) by any city, town or agency, board, commission, authority or instrumentality thereof, other than housing authorities shall be awarded only after a selection procedure adopted in writing, prior to publication requesting applications, complying with the purposes and intent of sections thirty-eight A 1/2 to thirty-eight O, inclusive, and the following requirements:"

The remainder of Section 38K (a) explains the specific minimum procedural requirements that must be satisfied to properly obtain proposals from designers. The State Designer Selection Board is responsible for publishing guidelines to assist public agencies not within the Board's direct jurisdiction (cities and towns) in the establishment of a professional and independent designer selection procedure consistent with the provisions and intent of the State designer selection statutes.

To carry out this advisory role, the State Designer Selection Board has issued the enclosed guidelines, that are revised as necessary, (Rev. March 2, 1991) to all cities and towns.

If you have any questions, please contact this office.

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The Designer Selection Board receives a large number of questions from local authorities related to the adoption or application of designer selection procedures to various situations. The following questions and answers represent those issues that are most often raised by cities and towns. The Board hopes that the answers will provide you with either specific or general direction in your efforts to properly comply with the designer selection requirements.

1. Is the employment of an educational programmer or planner considered a design service requiring public advertisement in accordance with approved designer selection guidelines?

ANSWER: No, unless the scope of services originally contemplates or develops into an evaluation of an existing facility or a new facility to determine the feasibility and costs of renovation, and/or to determine the feasibility and costs of constructing an addition or new facility. Where the services include what is conventionally termed an "architectural" program, the designer selection procedures apply.

2. Is there a minimum dollar threshold that must be exceeded before a formal designer selection procedure must be followed?

ANSWER: The law requires that whenever the design fee is estimated to cost \$10,000 or more, or whenever the estimated construction cost of a project is \$100,000 or more and design services are required, a designer selection procedure must be followed.

3. Is a feasibility study required prior to the employment of a designer to prepare development plans and specifications and/or construction documents?

ANSWER: A study is not required on local building projects. However, it is highly recommended that a study be completed before designing any project of substantial magnitude. The advantage of obtaining a comprehensive evaluation of the existing facility and/or proposed scope of work including consideration of feasible alternatives and related estimated costs cannot be understated. Without the benefit of this basic information, hiring a designer to prepare final contract documents at a fixed limit cost of construction for a pre-designated lump sum design fee is seldom prudent.

4. What is a reasonable fee to establish for the study, the design of construction documents and the administration of construction?

ANSWER: Chapter 7, section 38G (c) states:

"All fees shall be stated in designer's contracts and in any subsequent amendment thereto as a total dollar amount. Contracts may provide for equitable adjustments in the event of changes in scope of services."

Common practice does allow the establishment of a ceiling amount in the designer's contract, often referred to as an "upset amount", with actual payments being made for design services rendered on an hourly basis. This method of payment is normally used on "study projects" where the extent and difficulty of the work effort is unknown. The maximum hourly rate established on DCPO State projects is 2 1/2 times payroll costs not to exceed \$70/hr. The standard method of payment for a lump sum design contract is as follows:

15% of the total fee for the approval of schematics;
 30% of the total fee for approval of design development documents;
 70% of the total fee for the approval of construction documents, and;
 100% of the total fee upon final acceptance of the project.
 The last 25% of the fee is distributed proportionately throughout the construction phase.

The establishment of the total lump sum fee for design services depends on the magnitude and extent of difficulty of the project to be constructed. For instance, the OLD fee schedule recommended that libraries be categorized under Table I, Group II which is based on a category of building types. Schools (elementary and secondary), fire stations, police stations, gymnasiums, and recreational facilities are categorized under Table I, Group III. These percentage rates can no longer be used for public construction but are a useful guide to arrive at a lump sum fee. The following are several examples: (It may be appropriate to adjust these figures for inflation)

<u>Estimated Constr. Cost</u>	<u>Table I Gp. II Percent Fee</u>	<u>Approx. Equiv. Group II Lump Sum Design Fees</u>	<u>Table I Gp. III Percent Fee</u>	<u>Approx. Equiv. Gp. III Lump Sum Design Fees</u>
\$ 100,000	14.0	\$ 14,000	11.7	\$ 11,700
\$ 250,000	12.8	\$ 32,000	10.8	\$ 27,000
\$ 500,000	11.9	\$ 59,500	10.1	\$ 50,500
\$ 750,000	11.3	\$ 84,750	9.5	\$ 71,250
\$ 1,000,000	10.9	\$ 109,000	9.2	\$ 92,000
\$ 2,500,000	9.5	\$ 237,500	8.0	\$ 200,000
\$ 5,000,000	8.5	\$ 425,000	7.2	\$ 360,000
\$ 10,000,000	7.8	\$ 780,000	6.7	\$ 670,000
\$ 25,000,000	7.5	\$ 1,875,000	6.5	\$ 1,625,000
\$1,000,000,000	7.5	\$75,000,000	6.5	\$65,000,000

Fees for projects where the estimated construction cost is between amounts listed on the chart can be calculated by interpolation and the curve median compensation method. Renovations, additions, or projects which are more complex than the average of their type, may require a higher amount than shown above. The cost to study a project of this type could range from 5 to 15% of the above lump sum design fees depending on the extent of investigation needed (i.e., available utilities, wetlands, site evaluations, environmental factors, etc.).

5. Can the firm that completes the study also be employed to complete the design and administer the construction contract?

ANSWER: One basic premise developed in the designer selection statutes is that the study designer should be precluded from subsequent employment during the design development phase of the project. However, the statutes do provide municipalities with exceptions to this premise in the following circumstances:

- a. Designers performing studies for repair work may be continued to provide design services, provided, first, that such work is limited to identifying and correcting existing deficiencies in a portion of a building or its equipment; and second, that the designer's fee for the combined study and design of repairs is not greater than one hundred thousand dollars.

- b. Awarding authorities in cities and towns may allow a designer who conducted a feasibility study to continue with the design of a project if the authority commissions an independent review, by a knowledgeable and competent individual or business doing such work, of the feasibility designer's work to insure its reasonableness and its adequacy prior to allowing the designer to continue into the design development phase of the project. The review of a State agency with oversight or approval of a project may be sufficient for the purposes of this paragraph.

6. Can cities and towns use donated services or in-house staff for design and/or construction?

ANSWER: It appears that there are no legal restrictions against town employees or citizens from donating design services for public projects. Serious ramifications could develop, however, if any injury to an individual or property developed and that injury was due to errors or omissions in the design of the project. Furthermore, a designer should not be permitted to "donate services" during an early stage of a project and then be continued by the awarding authority, on a fee basis, to a later stage of the design.

7. Can a building project be subdivided into its component parts with provisions for donated time and materials to be combined with a general contractor's bid and construction of other major components?

ANSWER: Although a public authority may accept donated time and materials, the administration and coordination of different building components, i.e., roofing, electrical, plumbing, heating, etc. should be coordinated by a professional architect or engineer possessing the experience and expertise of providing contract documents that are in conformance with the new Massachusetts State Building Code and also Mass. G.L. Chapter 149, Section 44A to 44H, Section 44M, and Chapter 30, Section 39M, commonly known as the "bidding statutes". Dividing projects into smaller components merely to avoid threshold limits that trigger enactment of competitive bidding statutes is prohibited by law. Awarding authorities should proceed cautiously whenever a proposal is made to divide responsibilities for design and construction of a project by individual construction of building components on building projects.

8. Can cities or town request applicants for building projects to submit a fee proposal?

ANSWER: While there are no express provisions in the designer statutes that prohibits cities and towns from receiving competitive fee proposals from designers proposing to perform services related to a building project, there is a specific procedure to follow when an awarding authority intends to negotiate a fee. An argument can be made that the receipt of competitive fee proposals, prior to evaluating applicants, is contrary to the statutory provisions governing both the criteria for selecting designers and the method for determining the appropriate amount of a design fee. The Ward Commission's Final Report concluded that the receipt of competitive fee proposals was not in the overall public interest. The Inspector General adopted the position that public agencies are prohibited from receiving competitive fee proposals from designers.

The statutes state that:

"all fees must be stated in designer's contracts and in any subsequent amendment thereto as a total dollar amount. Contracts may provide for equitable adjustments in the event of changes in scope of services."

The total dollar fee amount may be set by the awarding authority prior to the receipt of applications from interested designers, or it may be negotiated. Designers should be reviewed and ranked on the basis of qualifications, not on the basis of the fee proposals. It is the DCPO's current policy to set all the fees in the public advertisement. DCPO does not receive fee proposals as it believes it is not beneficial to have professional designers effectively bidding against one another.

If the public agency determines that the fee is to be negotiated, the awarding authority must first establish a maximum fee which cannot be exceeded during negotiations. The awarding authority should then negotiate with the first ranked designer and if that negotiation fails then initiate negotiations with the second ranked designer and if again unsuccessful, proceed to the third ranked designer. The procedures as outlined in MGL Ch. 7 §38G(b) should be followed, which provides in part:

"The Deputy Commissioner (or Public Agency) may require a finalist with whom a fee is being negotiated to submit a fee proposal and include with it such information as the Deputy Commissioner (or Public Agency) requires to provide current cost and pricing data on the basis of which designer's fee proposal may be evaluated."

The public agency remains under an obligation to attempt to negotiate a satisfactory design fee with the first ranked designer before proceeding to negotiate with the next highest ranked designer.

